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5 Telephone: 509-457-5108

6 **Attorney for Defendant**  
7 Donovan Cloud

8  
9 **IN THE UNITED STATES DISTRICT COURT**  
10 **FOR THE EASTERN DISTRICT OF WASHINGTON**  
11 **(Honorable Salvador Mendoza, Jr.)**

12  
13 UNITED STATES OF AMERICA,  
14 Plaintiff,

15 vs.

16  
17 DONOVAN CLOUD,  
18 Defendant.

13 } NO. 1:19-CR-02032-SMJ-2

15 } MOTION FOR PRODUCTION OF  
16 } 404(b) EVIDENCE

17 } DATE: October 8, 2019  
18 } TIME: 8:30 a.m.

19  
20  
21 **TO: Clerk of U.S. District Court, Eastern District of Washington**  
22 **TO: Thomas J. Hanlon, Assistant United States Attorney**  
23

24 COMES NOW defendant, DONOVAN CLOUD, by and through his attorney  
25 of record, RICHARD A. SMITH, of *Smith Law Firm*, and respectfully moves the  
26 court for an Order requiring the Government to produce and designate the following:  
27  
28  
29

30 MOTION FOR PRODUCTION OF 404(b)  
31 EVIDENCE - Page 1

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1. All FRE 404(b) evidence which it intends to offer at trial against  
DONOVAN CLOUD.

This motion is made based upon the Memorandum of Points and Authorities  
submitted herewith.

DATED this 10th day of September, 2019.

Presented by:

/s/ Richard A. Smith

RICHARD A. SMITH, WSBA 15127

Attorney for Defendant Donovan Cloud

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**  
**MOTION TO PRODUCE 404(b) EVIDENCE**

**LEGAL ARGUMENT**

Rule 404(b) of the Federal Rules of Evidence provides that:

"Evidence of other crimes, wrongs, or acts are not admissible to prove the character of a person in order to show he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan..., provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice in good cause showing, of the general nature of any such evidence it intends to introduce."

To admit evidence under FRE 404(b), the Government must demonstrate:

- (1) Proof of the prior criminal acts sufficient to allow the jury to conclude that the act occurred and that the Defendant was the actor;
- (2) The prior act was not remote in time relative to the current charge.
- (3) Similarity between the incident charged and the prior act;
- (4) The prior act is introduced to prove an element of The current charge. *United States v. Jimenez*, 967 F.2d 1321, 1326 (9th Cir. 1992). Furthermore, the evidence must not be more prejudicial than probative under FRE 403 *United States v. Bailleaux*, 685 F.2d 1105, 1110 (9th Cir. 1982). These issues should be litigated in advance of trial as to avoid surprise or delay.

The Defendant requests that the Government provide counsel with notice of the intent to use Rule 404(b) evidence and to provide the nature of that evidence with sufficient particularity to provide counsel the opportunity to investigate and prepare to defend against it. The Defendant's request is particularly described as follows:

1. Any evidence the Government intends to introduce against the accused regarding prior or subsequent criminal conduct and/or "bad acts";
2. Any evidence the Government intends to introduce against the Defendant pursuant to rule 404(b);

3. Any evidence the Government intends to introduce against any party charged in the indictment prior to or subsequent criminal conduct and/or "bad acts" which is not charged in the indictment and not alleged as part of any charge in the indictment;
4. Any evidence the Government intends to introduce against any party charged herein pursuant to Rule 404(b);
5. Any evidence the Government intends to introduce concerning co-conspirators or alleged accomplices (whether charged or uncharged) regarding prior or subsequent criminal conduct and/or "bad acts" which is not charged or alleged in the indictment; and
6. Any evidence the Government intends to introduce concerning a co-conspirator or alleged accomplice pursuant to Rule 404(b) of the FRE.

DATED this 10th day of September, 2019.

Presented by:

/s/ Richard A. Smith

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on September 10, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

Thomas J. Hanlon, Assistant United States Attorney.

/s/ Lugene M. Borba

LUGENE M. BORBA

Legal Assistant, Smith Law Firm